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In the Supreme Court of the United States

OCTOBER TERM, 1998

HUMANA INC. AND HUMANA HEALTH INSURANCE OF NEVADA, INC.,

Petitioners,

v.

MARY FORSYTH, MARIETTA CADE, WILLIE ANDREWS, MARY LOU BUEHLER, HELEN STAVES, RANDOLPH BRATTON, AND SEARLE AUTO GLASS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE

BETTY CORDIAL, DEPUTY RECEIVER OF GEORGE WASHINGTON LIFE INS. CO.;

ARNOLD DUTCHER, DIRECTOR OF INSURANCE FOR THE STATE OF ILLINOIS, IN HIS CAPACITY AS LIQUIDATOR OF INSOLVENT ILLINOIS INSURANCE COMPANIES; and

BARRY G. HITTNER, DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF BUSINESS REGULATION, IN HIS CAPACITY AS RECEIVER OF AMERICAN AND CANADIAN UNIVERSAL INSURANCE COMPANIES

IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the statutory and court-appointed receivers of certain insolvent insurance companies. In this brief amici are referred to collectively as the "Receiver Amici." Some of the companies for which the Receiver Amici act failed because of unremarkable business reverses. Others, however, failed because persons in control illegally diverted policyholder premium dollars for their own personal use. Still others failed because those who operated them intentionally concealed their true financial condition from insurance regulators. Regardless of the cause of failure, however, the result was always the same: insurance consumers, who paid good dollars to purchase insurance coverage, were left essentially uninsured.

The Receiver Amici, of course, have no private, personal or economic stake in this review. In their capacity as fiduciaries for their estates, however, each amicus has a direct interest in the preservation of RICO, a powerful vehicle for the recovery of damages caused by misconduct that victimizes now-insolvent insurance companies. Each amicus has brought a civil RICO action against persons or entities whose criminal acts targeted an insolvent insurer. These actions have aimed to recover diverted assets and consequential damages. Amounts recovered have been added to the

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the amici curiae and their counsel, made a monetary contribution to the preparation and submission of this brief.

estate of the victimized insurer and eventually distributed to the insurer's policyholders and creditors.

Amicus Betty Cordial is the court-appointed receiver of George Washington Life Insurance Co., an insolvent West Virginia life insurer. Amicus Cordial brought a RICO action against the company's former officers, directors, accountants and attorneys, alleging they looted or aided in the looting of millions of policyholder premium dollars through sham subsidiaries and illegal dividends. Amicus Cordial recovered $7.3 million in pretrial settlements with the accountants and attorneys, and obtained a $13.6 million verdict against the directors and officers.[2]

Amicus Arnold Dutcher, Acting Director of Insurance for the State of Illinois, is the statutory liquidator of Reserve Insurance Company, ordered into liquidation in 1979, and numerous other insolvent insurers. The Liquidator of Reserve was plaintiff in a RICO action against the company's directors, officers, auditors and reinsurers. The Liquidator alleged that the defendants concealed the true financial condition of the company by acts of mail fraud, including the mailing of false financial statements, in which information about the company's liabilities and reinsurance was deliberately misstated. The Liquidator recovered $31 million in pretrial settlements in that action.[3]

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[2] The District Court decision upholding the legal sufficiency of the complaint is reported as *Clark v. Milam*, 872 F. Supp. 307 (S.D.W.Va. 1994).

[3] The Seventh Circuit's decision upholding the legal sufficiency of the complaint is reported as *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983).

Amicus Barry G. Hittner, Director of the Rhode Island Department of Business Regulation, appears in his capacity as Receiver of American and Canadian Universal Insurance Companies. These companies failed after they were looted by individuals who have now been criminally convicted for their misconduct. *United States v. Christopher*, 142 F.3d 46 (1st Cir. 1998), and *United States v. Reeder*, No. CR 93-41(02)B (D.R.I. June 27, 1997). Amicus Hittner has brought a civil RICO action against these looters and those who helped them obtain control of the companies.[4]

The Receiver Amici have found RICO to be an extraordinarily powerful weapon for vindicating their states' insurance regulatory goals by recovering damages for the benefit of the policyholders and creditors of insolvent insurers, and for punishing those whose illegal activities victimize insurance companies that are powerless to protect themselves from misconduct. Although in certain respects RICO parallels substantive state statutory or common law violations and remedies, RICO's provision for nationwide service of process has ensured receivers' ability to sue multiple wrongdoers in a single federal forum, a convenience that the states are simply powerless to provide. Further, RICO actions

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[4] Amicus Hittner's action, filed in the United States District Court of Rhode Island, was consolidated for discovery purposes with a RICO action by the receiver of an Arizona insurer that Christopher and Reeder also looted. (The action is now proceeding in the District Court in Arizona under the caption, *Hittner v. Sequa, et al.*, MDL 972, CIV-93-1035-PHX-RGS.) The District Court's memorandum opinion denying the defendants' motions to dismiss, issued March 28, 1995, is not reported, but copies have been lodged with the Court.

brought in the federal court have seemed, as a practical matter, to be greeted with heightened respect and concern by defendants, would-be defendants, and their chosen representatives.

For all these reasons, Receiver Amici have an interest in the issues raised in this proceeding, and they believe they may provide a unique insight into the significance of its outcome.

SUMMARY OF ARGUMENT

Petitioners and their amici have argued that RICO "impairs" state insurance laws within the meaning of section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1994), because civil RICO "disrupts," "interferes with," "upsets" and "frustrates" state regulation. Receiver Amici, the statutory regulators of insolvent insurers, join Amicus National Association of Insurance Commissioners, the statutory regulators of solvent insurers, to assure the Court to the contrary.

Actual regulatory experiences have proven that civil RICO actions enhance amici's ability to combat fraud by and against insurance companies. Indeed, civil RICO is the most effective tool currently available for collecting looted assets and damages on behalf of insurers that have been victimized by fraud. Access to civil RICO to attack fraud by or against insurers should not be denied. Further, in recent years, amici's anti-fraud efforts have been materially assisted by federal criminal mail and wire fraud prosecutions for conduct that falls within the "business of insurance." The broad finding for preemption sought by Petitioners will compel preemption of the federal criminal mail and wire fraud statutes as applied to such conduct, a result that can only help those criminals who treat insurance companies as their own private piggy banks.

For these reasons, the Receiver Amici urge that affirmance of the decision of the court below is the outcome that will best support effective state insurance regulatory efforts, the public policies that inform those efforts, and the purposes for which Congress ceded regulation of the business of insurance to the states. In addition, the Receiver Amici urge that affirmance of the decision of the court below is compelled by this Court's decision in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). There, the Court held that determining whether a general federal statute "impairs" state insurance regulation requires these inquiries: Does the state statute command something that the federal government has prohibited? Conversely, does the federal statute command something that the state insurance laws prohibit? In the case of RICO, the answer to both questions—as applied to every state's body of insurance laws and regulations—is "no." Therefore, RICO is not preempted in Nevada, or elsewhere, by operation of the McCarran-Ferguson Act.

ARGUMENT

I.

THE DIRECT CONFLICT TEST, EMPLOYED IN *SEC v. NATIONAL SECURITIES, INC.*, SHOULD DETERMINE WHETHER STATE INSURANCE LAWS PREEMPT RICO.

Petitioners' argument parrots the two appellate court decisions that hold RICO preempted when the underlying misconduct falls within the scope of the "business of insurance." Receiver Amici, of course, urge that the circuit court decisions holding against preemption have it right; and urge, as these circuits have concluded, that the question of whether a state's insurance law should preempt a federal statute, regardless of whether the federal statute provides materially different remedies, should be determined by the "direct conflict" test employed by the Court in *SEC v. National Securities, Inc.*, 393 U.S. 453.[5]

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[5] Although application of the "direct conflict" test is the jurisprudentially correct methodology for determining whether a federal law "invalidates, impairs or supersedes" a state law regulating the business of insurance under section 2(b) of the McCarran-Ferguson Act, the result of the test in a particular case will inevitably depend on the specific provisions of the federal and state laws at issue. In this case, the Receiver Amici believe that no invalidation, impairment, or supersession exists under either the "direct conflict" test or any other test proposed to this Court. However, they neither believe nor argue here that a "direct conflict" test necessarily mandates a narrow construction of the preemptive effect of the McCarran-Ferguson Act. The result will always depend on the facts of the statutes involved. In this regard the Receiver Amici do not agree with Respondents when they assert that Congress intended that the McCarran-Ferguson Act be narrowly construed.

Petitioners relegate *National Securities* to a footnote, in which it is dismissed as "inapposite." Brief of Petitioners at 19 n.11. But Petitioners are wrong. In that case the SEC asserted the Securities Exchange Act of 1934 as grounds for unwinding a merger between insurers that a state insurance commissioner had approved under the applicable state insurance statute. The Court stated the issue on review: "The question is, then, whether the McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation." 393 U.S at 462.

The Court answered the question by applying the direct conflict test, subsequently reflected in decisions of the First,[6] Third,[7] Fourth,[8] Fifth,[9] Sixth,[10]

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[6] *Villafane-Neriz v. F.D.I.C.*, 75 F.3d 727, 735 (1st Cir. 1996) (Federal Deposit Insurance Act provisions, as applied to an insurance company, are not preempted by the McCarran-Ferguson Act).

[7] *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 190 (3rd Cir.) *petition for cert. filed* (June 23, 1998) (RICO is not preempted by the McCarran-Ferguson Act).

[8] *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984) (Neither the prohibition in the Fair Housing Act against redlining nor Title VII's prohibition against employment discrimination is preempted by the McCarran-Ferguson Act).

[9] *Edwards v. Your Credit Inc.*, 148 F.3d 427, 433-34 (5th Cir. 1998) (Truth in Lending Act is not preempted by the McCarran-Ferguson Act in a case involving allegedly improper disclosures about an insurance premium).

[10] *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 1360-61 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996) (authority of the Department of Housing and Urban Develop-

(continued...)

Seventh,[11] and Ninth[12] Circuits, all of which support the outcome urged by Respondents and their amici:

> Nevertheless, respondents contend that any attempt to interfere with a merger approved by state insurance officials would "invalidate, impair, or supersede" the state insurance laws made paramount by the McCarran-Ferguson Act. We cannot accept this overly broad restriction on federal power.
>
> It is clear that any "impairment" in this case is a most indirect one. . . . Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so. . . . And the remedy the Commission seeks does not affect a matter predominantly of concern to policyholders alone; the merger is at least as important to those owning the companies' stock as it is to those

[10] (...continued)
ment to regulate homeowner's insurance policies under the Fair Housing Act is not preempted by the McCarran-Ferguson Act). *Compare Kenty v. Bank One Columbus, N.A.*, 92 F.3d 384, 391-393 (6th Cir. 1996) (RICO is preempted by state anti-fraud laws that conflict with RICO's remedies and procedural provisions).

[11] *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (Fair Housing Act is not preempted by the McCarran-Ferguson Act in a case charging redlining in insurance sold in connection with the purchase of a dwelling).

[12] *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995); and the decision from which this petition is taken, *Forsyth v. Humana*, 114 F.3d 1467 (9th Cir. 1998) (RICO is not preempted by the McCarran-Ferguson Act).

> holding their policies. In these circumstances, we simply cannot see the conflict.

393 U.S. at 463.

Petitioners contend, nevertheless, that the outcome of *National Securities* turned on the fact that the state and federal statutes in play regulated different conduct and protected different interests. Brief of Petitioners at 19 n.11. But while the Court's observations in this regard, set out in the passage quoted above, supported the outcome, they did not compel it. The outcome was compelled by the crucial inquiry: Did Arizona command something which federal law prohibited? *Id.* Was there, in other words, a direct conflict between a state mandate and a federal prohibition?

In any event, even if the outcome of *National Securities* was driven by the fact that the state and federal statutes regulated different conduct and protected different interests, the same point can be made about state insurance fraud statutes and RICO. The state laws can be broadly described as aimed at fraud by insurance companies. RICO is aimed at conducting or participating in the conduct of an enterprise through—typically and in this case—a pattern of mail and wire fraud proscribed by 18 U.S.C. § 1341 and § 1342. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481-83 (1985). Moreover, state insurance fraud laws protect insurance consumers; federal mail and wire fraud laws protect the public in general against criminals' use of the mails to execute schemes to defraud. *See United States v. Sylvanus*, 192 F.2d 96, 100 (7th Cir. 1951) (holding that a criminal mail fraud prosecution based upon the illegal operation of an insurance company is not preempted by the McCarran-Ferguson Act). In other

words, as between state insurance fraud statutes and RICO, they too can correctly be said to aim at different conduct and protect different interests.

Accordingly, Receiver Amici urge that the appropriate question for determining whether RICO falls in the face of state insurance fraud laws must be taken directly from *National Securities*: Do the state laws command something that RICO prohibits? Conversely, does RICO command something that the state laws prohibit? Is there a direct conflict between a state insurance law and a federal statute?[13]

II.

THE BASES FOR PREEMPTION URGED BY PETITIONERS ARE FACTUALLY UNSUPPORTED AND LOGICALLY UNSOUND.

Petitioners do not and cannot dispute that the availability of civil RICO to defrauded insurance consumers *supports* the substantive objectives of relevant Nevada insurance law. *See* Petitioners' Brief at 21. Instead, Petitioners supply a meaningless academic dissertation on the extent to which traditional federal preemption jurisprudence may or may not aid in applying section 2(b) of the McCarran-Ferguson Act to this case.

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[13] This test comports with the Court's holding in *United States Department of the Treasury v. Fabe*, 508 U.S. 491 (1993). (By operation of the McCarran-Ferguson Act, where there was a direct conflict between a state's priority scheme for distributing the assets of an insolvent insurer and a federal super-priority claim statute, the state scheme preempted the federal statute, insofar as the state scheme regulated the "business of insurance.")

But regardless of labels used in the debate—"reverse preemption," "inverse preemption," "direct conflict," or something else, Petitioners still need to establish the proposition that the availability of civil RICO to Respondents serves to "invalidate, impair or supersede any law enacted by [Nevada] for the purpose of regulating the business of insurance." Petitioners offer nothing more than speculation about legislative intent and the effect of civil RICO in support of their conclusions. Receiver Amici submit that this Court should not decide a case of this magnitude, involving as it does, important legislative policy determinations by two sovereigns, merely on the basis of speculation and assumptions.

Petitioners' remaining section 2(b) arguments involve the procedural and remedial provisions of Nevada's insurance laws and assumptions about the effects of civil RICO. Petitioners conclude that either because of differences between civil RICO and specific procedural and remedial aspects of Nevada law, or because Nevada has somehow exclusively occupied much or all of the "field" involving insurance consumer protection, RICO runs afoul of section 2(b) of the McCarran-Ferguson Act.[14]

But the bases for Petitioners' arguments about some kind of irreconcilable clash between civil RICO and the procedural and remedial components of the Nevada

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[14] Petitioners do not explicitly argue for a "field preemption" test, for the plain reason that elsewhere they argue the inapplicability of such field preemption reasoning in section 2(b) cases. Petitioners' Brief at 14. Nonetheless, the argument beginning at page 20 of Petitioners' Brief is essentially a "field preemption" argument without the label.

insurance laws are, at most, debatable, and in general no more compelling than a variety of alternative speculations and assumptions. For example, while Petitioners concede that a private right of action exists in Nevada for unfair insurance trade practices, Petitioners' Brief at 7, they argue that the availability of treble damages and attorneys' fees in a civil RICO case, nowhere mentioned in the Nevada unfair trade practices law, presents such a disparity in remedies that the Nevada laws would be impaired or superseded by RICO. Petitioners' Brief at 21-2. However, besides freighting more than seems plausible on what the Nevada legislature did *not* say, Petitioners ignore the obvious point that an unfair insurance trade practice claim is not the same thing as a RICO claim that may involve, *inter alia*, unfair insurance trade practices. Whatever may be concluded from what the Nevada legislature did not say about damages recoverable in a simple case of unfair trade practices, it seems sheer conjecture that Nevada intended its laws to serve as a shield to those who engage in the types of patterns and practices of criminal misconduct that RICO was intended to address.[15]

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[15] Petitioners broadly argue that RICO has no applicability to the business of insurance, but ignore the fact that actions taken within the business of insurance can have drastic financial and other consequences for those outside the insurer-policyholder "core" focus of the business of insurance identified by this Court in *National Securities*. Even if the Nevada legislature somehow intended to deprive consumers of RICO remedies, one could hardly argue that the legislature meant the Nevada insurance laws to have the same effect on general creditors, reinsurers, guaranty associations, employees, and others.

Similarly, Petitioners note the seeming inconsistency between the administrative nature of procedures for violations of Nevada insurance law, and the redress of such violations through the type of private right of action involved in a civil RICO case. Petitioners' Brief at 7. But the fact that the administration of that State's insurance laws is largely effected through an administrative agency is no more indicative of the existence and scope of private rights of action than is the case under the federal securities laws. *Cf. National Securities*, 393 U.S. at 467.

Finally, this Court should note the role of state insurance commissioners in enforcing state insurance laws, and their familiarity with the such laws and their procedural and remedial components. *See N.A.A.C.P. v. American Family*, 978 F.2d at 297. Amicus National Association of Insurance Commissioners, like the Receiver Amici, submits that civil RICO cases can and do enhance the effective administration of state insurance laws.

III.

PREEMPTING RICO WHERE THE MISCONDUCT INVOLVES THE BUSINESS OF INSURANCE WILL PROTECT CRIMINALS AND UNDERMINE INSURANCE REGULATORS' EFFORTS TO PREVENT FRAUD BY AND AGAINST INSURANCE COMPANIES.

Petitioners and their amici are, of course, all insurance companies or trade organizations for insurance companies—the intended targets of state regulation. Ironically, they nevertheless advance the pious asser-

tions that frauds committed by insurance companies be exempt from RICO lest state regulation be "disrupted," "interfered with," "upset," and/or "frustrated" (all of which terms sound perilously close to "conflict"). Brief of Amici Alliance of American Insurers, *et al.* at 27-29. Amicus Consumer Credit Insurance Association goes so far as to assert at page 16 of its brief that not exempting their members' misconduct from RICO "overturns this [state regulatory] system." All of these are mere naked contentions; for neither the Petitioners nor their amici offer a single concrete example from real life of RICO's actually interfering with state insurance regulation.[16]

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[16] Amici Alliance of American Insurers, *et al.* point to the successful administrative remediation of massive fraud claims against Prudential Insurance Company, Brief of Amici at 20, as an illustration of the contention that defrauded policyholders do not need RICO to obtain redress. But it is just as possible that Prudential settled those claims to *avoid* a policyholders' RICO suit. In other words, if this remediation illustrates anything relevant, it is that the availability of civil RICO does not prevent administrative remediation of significant disputes.

Amicus Consumer Credit Insurance Association argues that if policyholders can pursue civil RICO actions based upon alleged fraud involving policy forms and rates, insurers will be deterred from settling disputes about forms and rates with state regulators. Amicus Brief at 15-17. This stands logic on its head. If policyholders can pursue civil RICO actions, insurers should be deterred from committing fraud in connection with policy forms and rates in the first place!

A. Regulators of Solvent Insurance Companies Believe RICO Enhances Their Ability to Combat Fraud By and Against Insurance Companies.

The Receiver Amici respectfully encourage the Court to seek counsel about effective insurance regulation from the state insurance regulators, not from the companies whose conduct is the target of the regulation. These regulators have appeared as amici, through the National Association of Insurance Commissioners, to advise that RICO enhances their regulatory efforts. It does not disrupt, interfere, upset or frustrate them. For these reasons, these regulators have urged that RICO not be held preempted by the McCarran-Ferguson Act.

B. Regulators of Insolvent Insurance Companies Have Found RICO to be a Significant and Effective Tool for Recovering the Assets of Defrauded Insurers.

Likewise, the Receiver Amici, "regulators" of insolvent insurers, respectfully advise that RICO enhances their ability to do their job of marshalling the assets of insolvent insurers, particularly where they are called upon to recover looted assets and consequential damages resulting from the illegal operation of the insurer before it failed. State statutory and common law actions are just not as effective as RICO. State service of process and subpoena powers do not reach as far as RICO's nationwide service of process—an important consideration in frauds against large insurers, which are typically perpetrated by out-of-state actors. (For example, individual defendants and several non-defendant key witnesses in Amicus Hittner's RICO suit, filed in Rhode Island where the defrauded insurers were

domiciled, reside in New York, California, and Texas.) State actions are often complicated by quirky state contribution-among-tortfeasor or non-party-at-fault rules, which are inapplicable in RICO cases. *E.g.*, *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1118 (D.D.C. 1996) (contribution and indemnification unavailable under RICO); *Friedman v. Hartmann*, 787 F. Supp. 411, 417-18 (S.D.N.Y. 1992) (same). State actions are subject to local statutes of limitations, which often provide extra measures of protection to fraudfeasors that are unavailable in a RICO action. *E.g.*, 735 Ill. Comp. Stat. 5/13-214.2 (West 1998) (providing two-year limitations period for actions against accountants).

The Receiver Amici recognize that there is a distinction between the alignment of the parties in the case on review on the one hand, and in suits the Receiver Amici have filed on the other. In the case on review, an insurance company is alleged to have defrauded policyholders. In the Receiver Amici's cases insurance companies are alleged to have been the victims of fraud committed by their owners and operators and by third parties. But both fact constellations involve conduct that falls squarely within the "business of insurance."[17]

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[17] *Hittner v. Sequa* involves alleged misconduct in connection with obtaining regulatory approval for the sale of insurance companies. The Court has recognized that regulatory approval of such sales "clearly relates to the 'business of insurance.'" *National Securities*, 393 U.S. at 462. In *Schacht v. Brown* and *Clark v. Milam* the underlying misconduct involved alleged misstatements on financial statements required by and filed with state and federal regulators. Statutes and regulations aimed at monitoring the solvency of insurers, such as require-

(continued...)

If the Court reverses the decision on review, RICO may well be preempted in all suits filed for victimized insurance companies. In other words, the question on which the Court granted certiorari, stated in its short form, is this:

> Whether the application of RICO to the business of insurance would "invalidate, impair or supersede" state law regulating the same conduct in contravention of the McCarran-Ferguson Act?

If the Court answers that question with an unqualified "yes," it is likely that no civil RICO action involving the business of insurance could ever be pursued, whether the underlying misconduct was committed by or against an insurance company.

C. If Civil RICO Is Preempted Where the Underlying Misconduct Involves the Business of Insurance, Federal Criminal Mail Fraud and RICO Prosecutions of the Same Misconduct May Be Preempted As Well.

If the Court answers the certiorari question in the affirmative, criminal mail and wire fraud prosecutions under 18 U.S.C. § 1341 and § 1342 for frauds by and against insurance companies will also, apparently, be subject to McCarran-Ferguson Act preemption. The logic seems inescapable. Under Petitioners' theory, any federal statute that directly or indirectly regulates or

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[17] (...continued)
ments that insurers follow prescribed rules when accounting for financial results and report on those results to the insurance commissioners, are "core" regulation of the business of insurance under *National Securities*, 393 U.S. at 460.

penalizes conduct that is the "business of insurance" interferes with state insurance regulatory schemes that regulate or penalize the same conduct and, accordingly, is preempted.

Every state prohibits fraud committed by or against insurance companies. Every state also has legislatively prescribed criminal penalties for such frauds.[18] There is no principled basis for holding that a federal statute that provides civil remedies for misconduct by or against an insurance company is preempted because state statutes also provide such remedies, whereas a federal statute that provides criminal penalties for such misconduct is not preempted, even though state statutes also provide such penalties.

The Eighth Circuit attempted a distinction. In 1997 that court held the McCarran-Ferguson Act preempted a civil RICO action filed against an insurer by a bank borrower for whom the bank bought insurance as a condition of making the loan. *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997). Months later the court reviewed the mail fraud convictions of individuals who had given the Missouri insurance commissioner false financial information about Missouri insurance companies they controlled. *United States v. Blumeyer*, 114 F.3d 758 (8th Cir.), *cert. denied*, 118 S.Ct. 586 (1997).[19] The defendants argued that *Doe v. Norwest Bank* compelled preemption.

[18] Relevant statutes in the Receiver Amici's home states include 215 Ill. Comp. Stat. 5/134 (providing that falsification of records for purposes of defrauding insurance company, or any other company or person, is Class 4 Felony); R.I. Gen. Laws § 27-94-1 (providing fine of up to $50,000 and sentence of up to 20 years imprisonment, or both, for frauds with respect to financial condition of insurance company) and R.I. Gen. Laws § 27-47-1 *et seq.* (1998) (providing criminal sanctions for the failure to report impairment in insurance company's financial condition); W.Va. Code § 33-4-8 (1998) (providing general penalty of fine of up to $1,000 and sentence of up to six months imprisonment for person convicted of misdemeanor for violation of insurance code) and W.Va. Code § 33-35-1 *et seq.* (providing criminal sanctions for failure to report impairment in insurance company's financial condition).

The court disagreed, giving this as a reason: a civil RICO claim based on mail fraud could wreak "potential havoc" on state regulation whereas a criminal prosecution for mail fraud had no such potential. *Blumeyer*, 114 F.3d at 768. But this is no reason; it is, at most, guesswork unsupported by a single fact. The court also held that criminal mail fraud should survive McCarran-Ferguson Act preemption, but civil RICO based on criminal mail fraud should not: "And our particular concern in *Doe*—that wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief—is simply inapplicable here, for private parties are not empowered to bring criminal fraud charges." *Id.* (internal citation omitted). This is more unsupported guesswork. There is no evidence that wronged policyholders' RICO suits interfere with administrative processes. If they did, state legislators could stop the interference by merely prohibiting such suits. *Cf. N.A.A.C.P. v. American Family Mut. Ins. Co.*,

[19] In a statute has been on Missouri's books since the 1920's, Missouri provides that giving false information to the insurance commissioner is a crime punishable by a fine not exceeding one thousand dollars and by imprisonment for not less than two months in the county or city jail, nor more than five years in the penitentiary. Mo. Rev. Stat. § 374.210(3) (1998).

978 F.2d at 297; and *see* Brief of Amicus Curiae National Association of Insurance Commissioners.

Moreover, the reasoning ignores the fact that the holding effectively prohibits more than just policyholders' civil RICO suits. As pointed out above, it also effectively prohibits civil RICO suits brought on behalf of insurance companies that have been looted or otherwise defrauded. Finally, the reasoning disregards the structure of the RICO statute. RICO contains a single prohibitory section, 18 U.S.C. § 1962, which describes standards enforced through the criminal penalties provided in § 1963 and the civil remedies provided in § 1964. There is not one type of RICO violation that is a basis for § 1963 criminal consequences and another that is a basis for § 1964 civil consequences. If § 1962 is violated—say by the operation of an insurance company through a pattern of mail fraud—either may be invoked. Under the Eighth Circuit's reasoning, however, a criminal RICO prosecution for such a violation could proceed, but a civil RICO action for damages would be preempted. Such an anomalous result must be and is wrong. Either both mail fraud crimes and civil RICO actions by or against insurers based on predicate acts of mail fraud are preempted by the McCarran-Ferguson Act, or neither are preempted.

D. The Business of Insurance Attracts Criminals. Every State and Federal, Civil and Criminal Tool for Fighting Fraud By and Against Insurance Companies Should Be Preserved.

The United States Congress has recognized that the business of insurance is a magnet for criminals. As the House Committee on Energy and Commerce explained

in a report issued after its extended study of insurance insolvencies:

> The business of insurance is uniquely suited to abuse by mismanagement and fraud. Making believable promises is a stock item in every con man's bag of tricks. The prepayment of large, often vast, sums of money with few restrictions lends itself naturally to monumental wasting of assets through greed, incompetence, and dereliction of duty. This combination of easy money based on easy promises makes the insurance industry an irresistible target for financial knaves and buccaneers.

Staff of House Committee on Energy and Commerce, 101st Cong. 2d Sess., Failed Promises: Insurance Company Insolvencies (Comm. Print 101-P 1990).

Crimes against insurance companies invariably are committed by conducting "the business of insurance" in an illegal manner.[20] The Receiver Amici urge that every

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[20] Here are the facts from some contemporary reported opinions:

1. Charles Christopher and Wayne Reeder wanted to buy two insurance companies. They represented to the regulators that if the regulators approved the purchases, they would strengthen the financial condition of the companies by contributing valuable real estate, owned by Reeder, to the companies. They promised the regulators that by the time the purchases were approved all existing liens on the property would be paid in full. But Christopher and Reeder broke their promise. When the regulators approved the purchases, the liens had not been paid—a fact that was hidden from the regulators. Within weeks of obtaining control of the insurance companies, Christopher and Reeder diverted approximately $40 million of insurance company money to their own ac-

(continued...)

available tool for combatting crimes by or against insurance companies should be preserved. For the reasons given, under this Court's precedent a holding that the McCarran-Ferguson Act does not preempt civil RICO will be right, both as a matter of law and as a matter of sound public policy.

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[20] (...continued)

counts, using the funds to clear the liens and pay off other personal and business debts. Both companies failed, of course, unable to recover from the looting. Christopher and Reeder were both convicted of mail fraud. *United States v. Christopher*, 142 F.3d 46 and *United States v. Reeder*, No. CR 93-41(02)B (D.R.I. June 27, 1997).

2. Lawrence Neadle gave false financial information to regulators in order to obtain approval to operate a property and casualty insurer in the Virgin Islands. The misconduct was discovered after the insurer's policyholders suffered more than $37 million of losses in a hurricane, none of which the insurer could pay. Neadle pleaded guilty to mail fraud. *United States v. Neadle*, 72 F.3d 1104 (3rd Cir. 1995).

3. Glenn Martin operated a life insurance company. He looted $9,750,000 from the company by concealing policy sales and premiums from the insurance regulators, who were closely monitoring his activities because of their concern about the insurer's solvency. Martin and his sister, who was the corporate secretary, were convicted of conspiracy and mail fraud. *United States v. Cooper*, 132 F.3d 1400 (11th Cir. 1998).

Other published opinions describing contemporary prosecutions for mail fraud that victimized insurance companies include: *United States v. Sokolow*, 91 F.3d 396 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 960 (1997); *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994); *United States v. Cosentino*, 869 F.2d 301 (7th Cir. 1989); *United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988); *United States v. Sylvanus*, 192 F.2d 96; *United States v. Stewart*, No. 96-583, Mealey's Litigation Reports: Insurance Insolvency, H-1 (E.D. Pa. August 3, 1998) (copies of this decision have been lodged with the Court).

CONCLUSION

For all these reasons the Receiver Amici respectfully urge that the Court affirm the decision of the court below.

Respectfully submitted,

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